

November 30, 1972

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Dear Mr. Kleppe:

By letter of July 21, 1972, the Associate Administrator for Procurement and Management Assistance of your office, requests that our Office consider the refusal of the Corps of Engineers to make a small business set-aside in connection with a procurement it was making on behalf of the United States Postal Service.

The Associate Administrator states in part that--

"Rejection by the Army was based on a Memorandum of Understanding between the Postal Service and the Corps of Engineers. Under this memorandum the Postal Service must give written approval for the application of individual set-asides, and the Postal Service declines to give such approval. The rejection letter stated that the 'Corps of Engineers must, of course, abide by the terms of the Memorandum of Understanding and cannot unilaterally provide for set-asides in construction associated with Postal Service facilities.' Our appeal to the Assistant Secretary of Defense (I&L) pointed out that this Memorandum could not modify procurement law and regulations. The Department of Defense (DOD) rejected this appeal on the grounds that the Postal Service is exempt from the provisions of the Small Business Act, and that the Postal Service had limited the authority of the Corps of Engineers. Further, DOD argued, 'the funds of the Postal Service which are used to finance these procurements are not "appropriated funds" as that term is used in ASPR.'"

Your agency considers that Postal Service funds must be treated as appropriated money for the following reasons:

"1. The Postal Reorganization Act 'appropriated to the Postal Service all revenues received by the Postal Service.' (38 USC 2401)

"2. Annual appropriations are to be made for the use of the Postal Service (39 USC 2401) and these funds will not be separately identifiable after intermingling with postal receipts in the Postal Fund; therefore, all Postal Service funds should be treated by DOD as appropriations.

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"3. DOD appears to recognize these expenditures as being from appropriated funds, but argues that the term is not the same as that used in ASPR. SBA is unable to find any authority for distinguishing between the ASPR meaning of the term, 'appropriated funds' and the definition used elsewhere."

The Associate Administrator expresses the view that if the funds provided by the Postal Service are appropriated funds, then there can be no question of the applicability of ASPR 1-102, which applies ASPR to all purchases and contracts made by DOD for procurement of supplies and services which obligate appropriated funds except certain types of transportation services. He states that it therefore follows that small business set-aside procedures are valid and required, regardless of the provision of a Memorandum of Understanding.

The Associate Administrator, requests that we provide a determination of whether DOD is free under the Armed Services Procurement Act and the Postal Reorganization Act to modify the procedures of ASPR in regard to small business, for the expenditure of funds on behalf of the Postal Service.

Subsection 410(a) of title 39, United States Code, provides that:

"(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service."

Further, 39 U.S.C. 411 provides that:

"Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate."

As pointed out by the Assistant Secretary of Defense (Installation and Logistics) in his letter of June 28, 1972, to SDA, the first provision of law (39 U.S.C. 410a) quoted above exempts Postal Service procurements from the provisions of the Small Business Act, as well as from the provisions of all other Federal Laws dealing with Federal contracts with certain exceptions not pertinent here. Under this provision of law it is immaterial whether or not the Postal Service funds involved be considered "appropriated" funds. Further, while the "Memorandum of Understanding" between the Postal Service and the Corps of Engineers may not modify procurement law and regulations, it is clear that 39 U.S.C. 410 exempts the Postal Service from procurement laws and regulations issued pursuant thereto.

The effect of the second provision of law (39 U.S.C. 411) quoted above is to permit Executive agencies to furnish services to the Postal Service on such terms and conditions as the Postal Service and the head of the agency concerned deem appropriate. In view of such authority it is our opinion that the Corps of Engineers may render services to the Postal Service in the construction of postal facilities as generally set out in the "Memorandum of Understanding." In this connection we might point out that on October 8, 1970, the Secretary of Defense advised the then Postmaster General that he was authorizing the Secretary of the Army to initiate negotiations to develop an agreement whereby the Corps of Engineers would furnish construction services to the Postal Service.

Further, insofar as the Corps of Engineers is concerned, the Assistant Secretary of Defense (Installations and Logistics), the official responsible for issuing the Armed Services Procurement Regulation (ASPR) indicates, that insofar as ASPR 1-102 is concerned, that the funds of the Postal Service which are used to finance construction work for the Postal Service are not "appropriated funds" within the meaning of that term as used in the ASPR. The view of DOD as to what was intended by the term "appropriated funds" as used in ASPR is entitled to great weight since DOD issued the regulations. In this connection we note that the moneys used to finance the type of procurements involved here come from the "Postal Service Fund" established by 39 U.S.C. 2003, which consists of (1) revenues from services rendered by the Postal Service, (2) amounts received from obligations issued by the Postal Service, (3) amounts appropriated for use of the Postal Service, (4) interests which may be earned on investments of the Postal Service, (5) any other receipts of the Postal Service, and (6) the balance in the Post Office Department Fund (established under the prior law) as of the date of commencement of Postal Service operations. Considering the sources of the funds involved and the manner in which the Postal Service is authorized to operate by the Postal Service Act, we would not question the position

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of DOD that "the funds of the Postal Service which are used to finance these procurements are not 'appropriated funds' as that term is used in ASFR."

In light of the foregoing our Office would have no legal basis to object to the refusal of the Corps of Engineers—under its Memorandum of Understanding with the Postal Service—to set-aside contracts for small business except at the direction of the Postal Service.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General  
of the United States

The Honorable Thomas S. Kleppe  
Administrator, Small Business  
Administration